No. 86-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AS AMICUS CURIAE

JOHN F. DONELAN
FREDERIC L. WOOD *
DONELAN, CLEARY, WOOD & MASER, P.C.
1275 K Street, N.W.
Washington, D.C. 20005-4006
(202) 371-9500

Counsel for Amicus Curiae

* Counsel of Record

November, 1986

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-39

BURLINGTON NORTHERN RAILROAD COMPANY, *et al.*,
Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AS AMICUS CURIAE

The National Industrial Transportation League submits this brief as *amicus curiae* in support of the petitioners, Burlington Northern Railroad Company, *et al.* The League wishes to present its views on why this Court should reverse the decision of the United States Court of Appeals for the Seventh Circuit in *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees*, 793 F.2d 795 (7th Cir. 1986). Consent to the filing of this brief has

been received from counsel for the petitioners and for the respondents. Letters from both counsel granting consent have been filed with the Clerk of the Court.

INTEREST OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The National Industrial Transportation League is an incorporated trade association whose membership includes approximately 1400 members. They are shippers and receivers of freight and users of railroad transportation services located throughout the United States. Such shippers and receivers of freight transported by railroad carriers are heavily dependent on the uninterrupted availability of railroad transportation service in interstate and foreign commerce.

The issues in this case involve the application of the sometimes conflicting policies underlying the Railway Labor Act, on the one hand, and the Norris-LaGuardia Act, on the other, to situations where employees involved in a major labor dispute with their employing railroad engage in secondary picketing of other railroads which may provide connecting services to the shippers served by the railroad engaged in the primary labor dispute. Such secondary picketing can take place on very short notice and can have very disruptive effects on all of the transportation services being provided by the railroad carriers not engaged or involved in the primary labor dispute.

The court below held that the Norris-LaGuardia Act did not permit a federal court to enter an injunction against such secondary picketing, even where procedures established by the Railway Labor Act for the resolution of labor disputes in the railroad industry had not been followed between the employees engaged in the secondary picketing, and the railroads subject to such picketing. The League and its members believe it is essential for this Court to reverse the decision of the Court of Appeals on this important question of federal labor law and hold that the Railway Labor Act does not permit such secondary picketing.

ARGUMENT

I. Secondary Picketing Is Inconsistent with the Fundamental Purpose of the Railway Labor Act

The fundamental purpose of the Railway Labor Act is "to avoid any interruption to commerce or to the operation of any carrier engaged therein."Railway Labor Act, Section 2, 45 U.S.C. §151a. This purpose is achieved by the operation of the other provisions of the Act "requiring and facilitating free collective bargaining between railroads and the labor organizations representing their employees."*United Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 688 (1982).These procedures serve to "prevent, if possible, wasteful strikes and interruptions of interstate commerce."*Detroit and Toledo Shore Line R. Co. v. United Transportation Union*, 396 U.S. 142, 148 (1969).

The decision of the Court of Appeals below is inconsistent with this fundamental purpose of the Act, because it would prevent Federal courts from enjoining employees of a railroad engaged in a major labor dispute with one railroad from engaging in picketing of other railroads not involved in the dispute which may provide connecting services to the shippers served by the railroad which is involved in the labor dispute.

The explicit terms of the Railway Labor Act, 45 U.S.C. §§151-163, do not either bar or prohibit such "secondary" picketing, but, in order to carry out its fundamental purpose of preventing railroad strikes which interrupt commerce, it does establish elaborate procedures which must be followed before employees may resort to self-help measures such as picketing to resolve a major dispute with a railroad employer. 45 U.S.C. §152, §§155-160, and *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-380 (1969). The Act provides an "elaborate machinery for negotiation, mediation, voluntary arbitration, and conciliation" and imposes "upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted."*Detroit and Toledo Shore Line v. U.T.U., supra*, 396 U.S. at 148-149.

In this case, the members of the respondent labor unions, having exhausted all of the Act's remedies with respect to their primary employer, and being unsuccessful in their strike against the primary employer, chose to exert economic pressure on their employer by attempting to disrupt, by secondary picketing, the operations of other rail carriers which interchanged rail traffic with the primary employer. Pet. App. p. 2a. The secondary picketing would be expected to disrupt such operations by causing employees of the other railroads to refuse to cross picket lines established by the respondents' members. No effort was made to invoke, much less exhaust, with the other railroads the dispute resolution procedures of the Act before engaging in the picketing.

The Court should now decide that the Railway Labor Act must be interpreted so that, at the very least, railroad employees are required to exhaust the dispute resolution procedures of the Act with respect to other employers in the railroad industry (who may have some direct or indirect connection with the primary employer), before they may engage in self-help measures against such employers. If the Court of Appeals decision is not reversed, secondary picketing will become a more commonly used self-help measure in labor disputes under the Railway Labor Act with potentially major disruptions to transportation industries subject to its provisions.

Congress has not specified in the Railway Labor Act what measures, if any, each side may or may not resort to when all of the elements in the detailed statutory framework for labor dispute resolution in the railroad industry have been tried and failed. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-380 (1969). In particular, Congress has expressly neither prohibited nor authorized secondary picketing in the Railway Labor Act.

This fundamental dichotomy in the policies of the Railway Labor Act between the detailed procedures which must be utilized and the unspecified self-help measures which implicitly may then be utilized is placed in sharp focus by this case. On the one hand, the primary employees are seeking to exercise, after the dispute resolution procedures have been exhausted, one of the many techniques of economic self-help the Railway Labor Act does not explicitly prohibit in order to apply indirect economic pressure through other railroads on the primary employer and

to force resolution of the dispute. On the other hand, by picketing the secondary employer railroads, the primary employees are engaging in or causing a labor dispute with those employers, without following the same dispute resolution procedures of the Act already exhausted with the primary employer and thereby causing an interruption of their operations. Because this is inconsistent with the overriding statutory objective of avoiding "any interruption to commerce," (an objective of considerable importance to shippers such as members of The League), this Court should now decide that secondary picketing is not an allowable means of self-help under the Railway Labor Act.

Confronted before with the issue of secondary picketing under the Railway Labor Act, this Court, in view of the conflicting policies in the Act, contented itself with holding that the state courts could not become involved in determining the scope of lawful secondary activity. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal, supra,* 394 U.S. at 392-393.[1] The Court there stated that it would "allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muscle, so long as its use conflicts with no other obligation imposed by federal law."*Id.* But the Court should now hold that, because secondary picketing causes an interruption of commerce, it conflicts with just such an obligation, the statutory duty of exerting "every reasonable effort . . . to settle

[1] The issue was also presented in *Atlantic Coast Line Railroad Co. v. Brotherhood of Railway Trainmen,* 385 U.S. 20 (1966), but an equally divided Court was unable to resolve it. *Cf. Trans World Airlines v. Hardison,* 432 U.S. 63, 73 n. 8 (1977).

all disputes." Railway Labor Act, §2 First, 45 U.S.C. §152.

The holding of *Jacksonville Terminal* dealt only with the state pre-emption issue. But some of the lower federal courts (including the court below in this case) have improperly interpreted that case to say that the Railway Labor Act allows any and all secondary activity without requiring exhaustion of the Act's dispute resolutions procedures before the activity may be utilized. See Pet. App. pp. 10a-19a. See also *Richmond, F. & P. R. Co. v. Brotherhood of Maintenance of Way Employees,* 795 F.2d 1161, 1164-66 (4th Cir. 1986), *Central Vermont Ry. Inc. v. Brotherhood of Maintenance of Way Employees,* 793 F.2d 1298, 1302-3 (D.C. Cir. 1986) and *Consolidated Rail Corp. v. Brotherhood of Maintenance of Way Employees,* 792 F.2d 303 (2nd Cir. 1986). However, other Courts of Appeals have accepted the notion that in certain circumstances the federal courts may determine what is allowable secondary activity under the Railway Labor Act. *Ashley, D. & N. Ry. Co. v. United Transportation Union,* 625 F.2d 1357, 1367-1369 (8th Cir. 1980); *In Re Brotherhood of Railway, Airline and Steamship Clerks,* 605 F.2d 1073, 1075 (8th Cir. 1979) and *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co.,* 362 F.2d 649, 655 (5th Cir. 1966).[2]

This Court, however, has not previously ruled on the scope under the Railway Labor Act of lawful,

[2] Affirmed by an equally divided Court, 385 U.S. 20 (1966). The Fifth Circuit's position would also be controlling precedent in the Eleventh Circuit. *Florida v. Royer,* 460 U.S. 491, 505 n. 10 (1983).

non-violent, self-help economic activity.[3] Clearly, any such activity directed entirely against the primary employer is permissible once the Act's dispute resolution procedures have been exhausted. But in order to implement the fundamental purpose of the Act of avoiding to the greatest extent possible interruptions to the operations of neutral railroads, at the very least the Act's dispute resolution procedures must be observed with respect to the non-primary railroads before secondary picketing can be utilized.[4]

II. The Norris-LaGuardia Act Should Not Bar Injunctive Relief when Secondary Picketing Is Inconsistent with the Railway Labor Act

This Court also should decide that secondary picketing by railroad employees may be enjoined by federal courts under the Norris-LaGuardia Act. The issue involves determining whether such secondary picketing is activity "involving or growing out of any labor dispute."Sections 1, 4 and 13 of the Act, 29 U.S.C. §101, §104 and §113. This Court has given a broad interpretation to the statutory definitions of a

---

[3] The Court has held that Section 2 First of the Act does place a duty on the parties to a dispute to continue to bargain in good faith even after the specific dispute resolution procedures of the Act have been exhausted. *Chicago and N.W. Ry. Co. v. United Transportation Union*, 402 U.S. 570, 574-78 (1971). It has also held that the Act's duties limit the ability of the carriers to change the status quo during the period following exhaustion of the Act's procedures. *Brotherhood of Railway Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238, 244-48 (1966).

[4] There is also considerable support for the view that secondary picketing is absolutely barred, either because it was already unlawful at the time the Railway Labor Act was passed, or because it contravenes overall national labor relations policy. See petitioners' brief, pp. 20-21 and 29-35.

labor dispute. *Jacksonville Bulk Terminals v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 711-714 (1982). But the Court has also said:

> We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable.

Brotherhood of Railroad Trainmen v. Chicago R. & I. R. Co., 353 U.S. 30, 40 (1957). This Court has established the principle that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to enter injunctions to ensure compliance with the various mandates of the Railway Labor Act. *Chicago & N.W. Ry. Co. v. United Transportation Union*, 402 U.S. 570, 581-82 (1971) and cases there cited.

The lower federal courts, lacking any definitive guidance from this Court on whether injunctions against secondary picketing in the railroad industry were prohibited by the Norris-LaGuardia Act, have arrived at divergent views of the matter. In the case previously before this Court, the Court of Appeals for the Fifth Circuit had held that a test based on a determination of the employees' economic self-interest should be applied in interpreting the statutory terms involved. *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co., supra*, 362 F.2d at 653, 655. This test has also been explicitly adopted by the Eighth Circuit in *Ashley D. & N. Ry. Co. v. United Transportation Union, supra*, 625 F.2d at 1362-64.

The court below in this case, on the other hand, expressly rejected this test, and held that the literal terms of the Norris-LaGuardia Act removed federal court jurisdiction to enjoin such secondary picketing whether or not it could be found to be inconsistent with the Railway Labor Act. Pet. App. pp. 19a-23a. See also *Richmond F. & P. R. Co. v. Brotherhood of Maintenance of Way Employees*, *supra*, 795 F.2d at 1166-67, *Central Vermont Ry. Co. v. BMWE*, *supra*, 793 F.2d at 1299-1301, and *Consolidated Rail Corp. v. BMWE*, *supra*, 792 F.2d at 305.

These divergent views on the application of the Norris-LaGuardia Act to secondary picketing in the railroad industry have resulted in prolonging labor disputes in that industry, and causing unsettled labor conditions to the detriment of the uninterrupted flow of commerce. This Court must provide the parties to present and future labor disputes with a uniform nationwide understanding of the role, if any, of injunction suits in regulating secondary picketing in the railroad industry. If the Court rules, as urged here, that the duties imposed by the Railway Labor Act do not permit secondary picketing until the dispute resolution procedures have been exhausted, then injunctive relief should be available to enforce those duties. If the role of injunctions in this area is thus settled, then the parties to labor disputes will be able to formulate their strategies so as to allow the interplay of economic forces to provide the impetus for prompt resolution of such disputes. Such prompt resolution of railroad labor disputes would plainly be of substantial benefit to all users of the transportation services provided by the railroads and their employees.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

John F. Donelan
Frederic L. Wood *
Donelan, Cleary, Wood & Maser, P.C.
1275 K Street, N.W.
Washington, D.C. 20005-4006
(202) 371-9500

Counsel for Amicus Curiae

* Counsel of Record

November, 1986